

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JAIPUR BENCH

JUDGMENT

Bangali & Others Vs. State of Raj.
(D.B. Criminal Appeal No.255/2002)

D. B. Criminal Appeal under Sec.374 (2) Cr.P.C.
against the judgment dated 13-2-2002 in Sessions
Case No.155/2001 passed by Shri Pramod Kumar
Mathur, RHJS, Additional Sessions Judge (Fast Track)
No.2 Dholpur.

Date of Judgment:

July 16, 2007.

PRESENT

HON'BLE MR. JUSTICE SHIV KUMAR SHARMA
HON'BLE MR. JUSTICE SANGEET LODHA

Mr. Biri Singh Sinsinwar] for the appellants.
Mr. Kamendra Sihag]

Mr. M.L.Goyal, Public Prosecutor for the State.

BY THE COURT: (PER HON'BLE Shiv Kumar Sharma,J.)

The appellants, six in number, were put to trial before learned
Additional Sessions Judge (Fast Track) No.2 Dholpur, who vide judgment
dated February 13, 2002 convicted and sentenced them as under:-

Appellant Rajesh:

U/s.302 IPC:

To suffer life imprisonment and fine of Rs.3000/-, in default
to further suffer six months simple imprisonment.

U/s.307 IPC:

To suffer rigorous imprisonment for five years and fine of
Rs.1000/-, in default to further suffer simple imprisonment for
two months.

U/s.324/149 IPC:

To suffer rigorous imprisonment for two years and fine of Rs.500/-, in default to further suffer simple imprisonment for one month.

U/s.323/149 IPC:

To suffer rigorous imprisonment six months and fine of Rs.300/-, in default to further suffer simple imprisonment for fifteen days.

U/s.325/149 IPC:

To suffer rigorous imprisonment for three years and fine of Rs.1000/-, in default to further suffer simple imprisonment for two months.

U/s.148 IPC:

To suffer rigorous imprisonment for two years and fine of Rs.1000/-, in default to further suffer simple imprisonment for two months.

Appellants Bangali, Jogesh, Dinesh, Omi @ Om Prakash and Sarvesh:
U/s.302/149 IPC:

Each to suffer life imprisonment and fine of Rs.3000/-, in default to further suffer six months simple imprisonment.

U/s.307/149 IPC:

Each to suffer rigorous imprisonment for five years and fine of Rs.1000/-, in default to further suffer simple imprisonment for two months.

U/s.324/149 IPC:

Each to suffer rigorous imprisonment for two years and fine of Rs.500/-, in default to further suffer simple imprisonment for one month.

U/s.323/149 IPC:

Each to suffer rigorous imprisonment six months and fine of Rs.300/-, in default to further suffer simple imprisonment for fifteen days.

U/s.325/149 IPC:

Each to suffer rigorous imprisonment for three years and fine of Rs.1000/-, in default to further suffer simple imprisonment for two months.

U/s.148 IPC:

Each to suffer rigorous imprisonment for two years and fine of Rs.1000/-, in default to further suffer simple imprisonment for two months.

The substantive sentences were ordered to run concurrently.

2. It is the prosecution case that on July 16, 1992 at 11.15 PM Parmatma Prasad ASI (Pw.19) of Police Station Kotwali Dholpur reached Sadar Hospital Dholpur and recorded statement of Kalla (Pw.4), who was admitted in an injured condition. It was inter alia stated by Kalla in Parcha Bayan (Ex.P-10) that in the evening he had gone to the house of Dongar Tyagi and demanded money borrowed by Dongar Tyagi from him but Dongar Tyagi bluntly refused to make payment and hurled abuses at him. He got frustrated and came back to his well where Ramveer, Gopal and Pancham were already sitting. Soon thereafter Dongar Tyagi, Rajesh, Sarvesh, Omi, Dinesh and Bangali came to the well and surrounded him. Rajesh opened fire at him, but he some how escaped and fire hit Biram Devi, who was passing on the road. She fell down and died instantly. Kalla further stated that Rajesh opened another fire that hit below his right shoulder and palm. Mahesh and Ramji were also given beating with Pharsa, lathi by the assailants. On that Parcha Bayan a case under sections 147, 148, 149, 302, 323 and 324 IPC was registered and investigation commenced. Autopsy on the dead body was performed, site was inspected, necessary memos were drawn, statements of witnesses were recorded, appellants were arrested and on completion of investigation charge sheet was filed. In due course the case came up for trial before the learned Additional Sessions Judge (Fast Track) No.2, Dholpur. Charges under sections 148, 302, 302/149, 307, 307/149, 324/149, 323/149, 325/149 and 342 IPC were

framed against the appellants, who denied the charges and claimed trial. The prosecution in support of its case examined as many as 19 witnesses. In the explanation under Sec.313 CrPC, the appellants claimed innocence. No witness in defence was however examined. Learned trial Judge on hearing final submissions convicted and sentenced the appellants as indicated above.

3. We have heard learned counsel for the appellants and learned Public Prosecutor and with their assistance scanned the material on record.

4. Deceased, named as Biram Devi in FIR, was in fact Charan Devi and as per Post Mortem Report (Ex.P-15) following ante mortem injuries were found on the dead body:-

1. Punctured wound five in number over Rt. side chest 0.2cm x 0.2cm oval in shape inverted margin (in upper 2/3rd)
2. Punctured wound over Rt. shoulder 0.2cm x 0.2cm oval in shape inverted margin
3. Punctured wound over sternum in upper 1/3rd 0.2cm x 0.2cm
4. Punctured wound two in no. over Rt. forearm, in middle 1/3rd posterior lateral aspect parallel to each other 0.2cm x 0.2cm
5. Punctured wound on Lt. side chest below breast 0.2cm x 0.2cm oval, inverted margin

In the opinion of Dr. Ramesh Chand Pipesh (Pw.5) the cause of death was hemorrhagic shock due to gunshot injury to vital organs of the body.

5. Having closely weighed the material on record we find that Ramveer (Pw.16) Gopal (Pw.13) and Pancham (Pw.14) who were named as eye witnesses of the occurrence, did not support the prosecution case and they were declared hostile. Kalla (Pw.4), who sustained injuries during the incident and on whose testimony the prosecution heavily relied its case, completely changed the prosecution story. At the outset of his testimony he

deposed that he had no quarrel with the appellants:-

मैं समस्त मुलजिम मौजूदा अदालत को जानता हूं। मेरा इनसे कभी कोई झगडा नहीं हुआ।

Giving details of the incident Kalla stated that Rajesh who was armed with a gun belaboured Ramji in front of the house of Asha Ram and Pat Ram. Sarvesh also had a gun whereas Dinesh, Bangali and Omi had lathis. While Ramji was given beating with lathis and he (Kalla) was 20-25 steps away, Rajesh opened fire at him but he somehow saved himself and gunshot hit Charan Devi who died on the spot. Rajesh opened another fire and caused injuries over his shoulder and palm. Thereafter gun was broken and snatched by Rajveer and Hajari. In the cross examination when he was confronted with his Parcha Bayan (Ex.P-10), he deposed that he did not say anything about Dongar Tyagi. He further stated that except Parcha Bayan police did not record his statement:-

"अस्पताल में जो मेरा बयान हुआ उसके अलावा मेरा कोई बयान पुलिस ने नहीं लिया।"

He further stated that when Ramji reached near the house of Asha Ram, Rajesh met him and Ramji and Rajesh quarreled in front of the house of Asha Ram. He too did reach there. Rajesh and other assailants surrounded him at the well and this fact was wrongly mentioned in Parcha Bayan (Ex.P-10). According to him the incident, in fact did occur at Jatav Mohalla:-

"यह बात सही है कि रमजी को मारपीट करते देखकर मैं रामवीर, गोपाल, पंचम राजवीर बचाने भागे ... मेरे साथ घटना जाटव मोहल्ला में हुई यह बात मैंने पर्चा बयान के समय बता दी थी परन्तु प्रदर्श पी-10 में जाटव मोहल्ले में घटना होने का नहीं लिखा है।"

6. Pat Ram (Pw.1), in front of whose house alleged incident

occurred, gave new twist to the prosecution story. According to him while Rajesh, Mahesh and Ramji scuffled, the gun suddenly got fired:-

"राजेश, महेश, रमजी में गुत्थमगुत्था हुई पटका पछाड़ी हुई बन्दूक चल गई ...

कल्ला बीच बचाव कर रहा था। बन्दूक चलते समय कल्ला को लग गई कल्ला के ठीक पीछे चरण देवी आ रही थी उसके भी वहीं फायर लगा। फायर एक ही हुआ था।"

Pat Ram was however declared hostile by the prosecution.

7. It is also revealed to us while turning the pages of record that the prosecution failed to examine the police officer who conducted the investigation of the case.

8. On analysing the evidence adduced at the trial we find that the prosecution failed to establish that the appellants were the members of unlawful assembly whose common object was to kill the deceased. There is a consistent evidence on record to prove that the death of Charan Devi was caused by the isolated act of the appellant Rajesh and he alone was liable for the killing. Thus the aid of section 149 IPC could not be invoked to fasten liability on the other appellants.

9. Learned counsel for the appellant further contended that since Rajesh did not have any intention to kill Charan Devi he was not liable to be punished simplicitor under section 302 IPC.

10. Considering this submission when we recapitulate the testimony of Kalla (Pw.4) we find that although Rajesh opened fire at Kalla, the innocent passerby Charan Devi became victim. In such a situation section 301 IPC comes into operation which reads as under:-

"301. Culpable homicide by causing death of person other than person whose death was intended.- If a person, by doing

anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person, whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person whose death he intended or knew himself to be likely to cause.”

11. Section 301 embodies what the English authors describe as the doctrine of transfer of malice or the transmigration of motive. COKE calls it coupling the event with the intention and the end with the cause. LORD COLERIDGE CJ (in *Latiman* 17 Q BD 359) observed thus:-

“It is common knowledge that a man who has an unlawful and malicious intent against another, and in attempting to carry it out, injures a third person, is guilty of what the law deems malice against the person injured, because the offender is doing an unlawful act and has that which the Judges call general malice, and that is enough.”

12. Invoking Section 301 IPC we hold appellant Rajesh guilty under section 302 IPC. So far as the charge against him under section 307 IPC is concerned we find inconsistency in the statements of prosecution witnesses and in our opinion Rajesh could not be held guilty under section 307 IPC.

13. Since the origin and genesis of the incident had been withheld and place of incident had been changed by giving many twists and turns to the original prosecution story, we do not find it safe to convict other appellants Bangali, Jogesh, Dinesh, Omi @ Om Prakash and Sarvesh and grant them benefit of doubt.

14. For these reasons, dispose of the instant appeal in following terms:-

(i) We allow the appeal of appellants Bengali, Jagesh, Dinesh, Omi @ Om Prakash and Sarvesh and acquit them of the charges under sections 148, 302/149, 307/149, 324/149, 323/149 and 325/149 IPC. These appellants are on bail, they need not surrender and their bail bonds stand discharged.

(ii) We find no merit in the appeal of appellant Rajesh and maintain his conviction and sentence under section 302 IPC. We however acquit him of the charges under sections 148, 307, 324/149, 323/149 and 325/149 IPC.

(iii) The impugned judgment of trial court stands modified as indicated above.

(Sangeet Lodha),J.

(Shiv Kumar Sharma)J.

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